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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 09/641,410 | 08/18/2000 | Alice Mary O'Donnell-Kiely | | 7256 |

7590

05-23-2003

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| EXAMINER |
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WEINSTEIN, STEVEN L

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| ART UNIT | PAPER NUMBER |
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1761

DATE MAILED: 05/23/2003

11

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/641410

Applicant(s)

KIELY

Examiner

S. WEINSTEIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- ☒ Responsive to communication(s) filed on 1/23/03
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 72-98 is/are pending in the application.
- Of the above claim(s) _____ is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 72-98 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
- ☐ Certified copies of the priority documents have been received.
- ☐ Certified copies of the priority documents have been received in Application No. _____.
- ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☒ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other _____

Office Action Summary

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 76-81, 89, 90, 94 and 96 are rejected under 35 USC 112, first paragraph for being based on a non-enabling disclosure.

In regard to claim 76, claim 76 can be construed to recite that the edible support comprises one or more elements a through m, and particulate matter and a homogenous comestible. The claim is based on a non-enabling disclosure, since it is not seen that the specification supports one or more of elements a through m as well as having particulate matter and be homogenous. In fact, since the edible support is disclosed as being a composite, how can it be homogenous? The two are mutually inconsistent. Clarification and/or correction of the claim language is requested. That is, if the particulate matter and homogenous comestible are additional to the support, the claims, should reflect this. For purposes of examination, since applicant has not defined composite edible support, this phrase will be construed to mean any two materials in contact with each other. Claim 77 recites that the additional confection provides a "lollipop configuration". Neither claim nor the specification is clear as to what this means. Claim 79 recites that the supported comestible includes means for inhibiting the breakage of the edible support. As disclosed, it is not clear what is this "means for inhibiting breakage". Similarly in claim 80 for the phrase means for providing a supported comestible "designed for a child". How would this supported comestible differ from any other? What makes the comestible "designed for a child"? Claim 81 shares a

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similar problem as that of claim 76. That is, if one construes claim 81 as the barrier having all the properties of elements a-e as well as additional properties of the second a and b, where is this supported in the specification? If these are alternative expressions of characteristics, the claim should be amended to make this concept clearer.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 72-76, 87, 88, 91, ⁹²95 and 98 are rejected under 35 U.S.C. 102(b) as being anticipated by Ref. N (Swiss 649197).

Ref. N discloses a supported comestible comprising a comestible comprising a body of an edible substance and a substantially composite edible support capable of supporting the comestible wherein the edible support replaces the conventional wood ("bois") or plastic ("plastique") sticks used to support frozen confections. Thus, since the composite edible support replaces the conventional ice cream sticks, it would inherently have a first portion in the comestible and a second portion outside the comestible for hand held support. Thus, contrary to what has been urged, Ref. N not only teaches edible support sticks are conventional, but also teaches composite edible sticks are conventional as well. In regard to claim 74, Ref. N discloses that the support has good mechanical resistance and is thus inherently "substantially" non-malleable. In regard to claim 76, as noted above, the wording and thus the intent of claim 76 is unclear. If one construes all of the elements in the alternative, then Ref. N discloses

sugar as an ingredient of the edible support. In regard to the method claim 95, since Ref. N discloses the composite edible sticks replace the conventional wooden sticks, Ref. N inherently teaches adding the stick to the comestible before freezing which is how the wooden sticks are added to the confection since after freezing, the addition of the stick would be difficult or impossible.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 76-79, 86, 93 and 97 rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Musher (2,217,700).

If one construes claim 76 to recite one of the elements a through m and a particulate and a homogenous comestible, then Musher can be relied on to teach the conventionality of edible supports (36), additional edible homogenous material (35) and particulate material (10). Once it is known to provide edible and even edible composite supports, the particular conventional additional materials one chooses to add is seen to have been an obvious matter of choice and one of personal taste and to modify, Ref. N would therefore have been obvious. In regard to claim 77, although it is not clear what a "lollipop configuration" means, as noted above, Firmin teaches a support stick plus additional confection and to modify Ref. N, for its art recognized and applicants intended function would have been obvious. The particular conventional additional confection (i.e., chewing gum), would have been an obvious matter of choice and personal

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preference. In regard to claim 78, the phrase an "ingredient of a manufacturer" is not clear. In any case, as noted above, mixing and matching conventional food ingredients and/or products would have been obvious. In regard to claim 93, it is not clear what a "confection substitute" is. Is it e.g., an artificial sweetener? In any case, it is assumed applicant is employing a conventional product and/or composition and to employ any product for its art recognized and applicant's intended function would have been obvious.

Claims 79 and 89 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Barricini (2,469,589).

Claim 79 recites "means for inhibiting breakage". As noted above, it is not clear what this means. In any case, since Barricini teaches the addition of ribs to reinforce a confectionary support stick, it would have been obvious to provide such means to Ref. N for its art recognize and applicant's intended function.

Claims 80, 90, 94 and 96 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Gaul (Germ 3617093).

As noted above, "designed for a child" is unclear. In any case, it would have been obvious to modify Ref. N and provide the handle with a shape for easy gypping for a child thus, (thus designed for a child) as taught by Gaul.

Claim 81 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Firmin (1769215) and Jones (1947010).

It would have been obvious to provide chocolate or a moisture proof barrier on the support of Ref. N in view of the teachings of both Firmin and Jones who provide a support stick which can be edible with a chocolate coating.

Claim 82 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Ref. Q (Swiss 647394).

It would have been obvious to modify Ref. N and add a protective mess guard in view of Ref. Q which adds such an expedient for its art recognized and applicants intended function.

Claim 83 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Sueskind (2,832,708) and Parr (1,835,719).

It would have been obvious to modify Ref. N and add an edible drip guard to the support comestible in view of Sueskind and Parr, both of whom teach the drip guard for applicant's reason in applicant's environment.

Claim 84 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Kennedy (2464515).

It would have been obvious to modify Ref. N and provide for the support of more than one comestible as taught by Kennedy who teaches applicant's problem and solution.

Claim 85 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Hart et al (6,054,158).

Claim 85 differs from Ref. N in the recitation of a means for supporting the comestible upright on its own. Hart et al teaches it was conventional to employ such a

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means/support and to modify Ref. N and provide self-supporting capability for its art recognized and applicants intended function would therefore have been obvious.

Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is 703-308-0650. The examiner can generally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is 703-308-0661.

S. Weinstein/mn
May 6, 2003

Steve Weinstein
STEVE WEINSTEIN
PRIMARY EXAMINER 1761
5/5/03